

## Rule 1.14 and Comments – As Proposed by the Standing Advisory Committee on the Rules of Professional Conduct

### Marked to Show Changes from Current SJC Rule 1.14 and Comments

#### Rule 1.14 Client With Diminished Capacity~~CLIENT UNDER A DISABILITY~~

(a) When a client's ~~ability~~capacity to make adequately considered decisions in connection with ~~the~~a representation is ~~impaired~~diminished, whether because of minority, mental ~~disability~~impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) ~~If a~~When the lawyer reasonably believes that ~~a client has become incompetent or that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, and if the lawyer reasonably believes that the client~~the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial ~~harm, physical, mental, financial, or otherwise, the lawyer may take the following action. The lawyer may consult family members, adult protective agencies, or other~~physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting with individuals or entities that have ~~authority~~the ability to take action to protect the client, ~~and, if it reasonably appears necessary, the lawyer may seek and, in appropriate cases, seeking~~the appointment of a guardian ad litem, conservator, or a guardian, as the case may be. The lawyer may consult only those individuals or entities reasonably necessary to protect the client's interests and may not consult any individual or entity that the lawyer believes, after reasonable inquiry, will act in a fashion adverse to the interests of the client. In taking any of these actions the lawyer may disclose confidential information of the client or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's<sup>2</sup> interests.

#### ~~Comment~~

#### Comments

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client ~~is a minor or suffers from a mental disorder or disability~~has diminished capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~with diminished capacity often has

the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client ~~suffers a disability~~ has diminished capacity does not ~~diminish~~ lessen the lawyer's obligation to treat the client with attention and respect. ~~If~~ Even if the person has ~~no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have~~ a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer may also consult family members even though they may be personally interested in the situation. Before the lawyer discloses confidential information of the client, the lawyer should consider whether it is likely that the person or entity to be consulted will act adversely to the client's interests. Decisions under Rule 1.14(b) whether and to what extent to consult or to disclose confidential information are matters of professional judgment on the lawyer's part.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. ~~In situations involving care of the person or property of the client, if a legal representative has not been appointed, the lawyer may consult various individuals and take the specific actions mentioned in Rule 1.14(b). In particular, the lawyer may consult family members even though family members may be personally interested in the situation. If reasonable inquiry discloses that the family member will act adversely to the client's interest, the lawyer may not consult that family member. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.~~ [4] — If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See ~~Rule~~ Rules 1.2(d), 1.6, 3.3 and 4.1.

### Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining whether a client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a client is unable to make an adequately considered decision regarding an issue, and if achieving the client's expressed preferences would place the client at risk of a substantial harm, the attorney has four options. The attorney may:

- i. advocate the client's expressed preferences regarding the issue;
- ii. advocate the client's expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;
- iii. request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or
- iv. determine what the client's preferences would be if he or she were able to make an adequately considered decision regarding the issue (a "substituted judgment" determination) and represent the client in accordance with that determination.

However, there may be circumstances where some of the options identified above will be inappropriate or unwarranted. Such circumstances will often arise in the representation of clients in criminal, delinquency and youthful offender, civil commitment and similar matters.

Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

### Disclosure of the Client's *Condition*

~~[5] Rules of procedure in litigation generally provide that minors or persons lacking sufficient capacity shall be represented by a guardian or next friend if they do not have a general guardian. Although disclosure of the client's disability can adversely affect the client's interests, the Rule specifically provides that the lawyer may disclose confidential information only to the extent necessary to protect the client's interests.~~'s Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

### Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

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